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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 TODD and KAREN BRANDT,

8 Plaintiffs,

9 v.

10 AMERICAN BANKERS INSURANCE
11 COMPANY OF FLORIDA,

12 Defendant.

CASE NO. C08-5760BHS

ORDER GRANTING
DEFENDANT'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT

13 This matter comes before the Court on Defendant's motion for partial summary
14 judgment (Dkt. 49). The Court has considered the pleadings filed in support of and in
15 opposition to the motion and the remainder of the file and hereby grants the motion for
16 the reasons stated herein.

17 **I. PROCEDURAL HISTORY**

18 On December 17, 2008, Plaintiffs filed their complaint against Defendant. Dkt. 1.
19 On March 23, 2009, this matter was reassigned to the undersigned. Dkt. 11. On March 22,
20 2009, the Court ordered default judgment against Defendant. Dkt. 16. On September 16,
21 2009, the Court set aside the default judgment. Dkt. 42. On December 30, 2009,
22 Defendant moved the Court to enter partial summary judgment against Plaintiffs on the
23 issue of extra-contractual claims. Dkt. 49. On January 22, 2010, Plaintiffs responded. Dkt.
24 53. On January 22, 2010, Defendant replied. Dkt. 54.

25 **II. DISCUSSION**

26 **A. Summary Judgment Standard**

27 Summary judgment is proper only if the pleadings, the discovery and disclosure
28 materials on file, and any affidavits show that there is no genuine issue as to any material

1 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
2 The moving party is entitled to judgment as a matter of law when the nonmoving party
3 fails to make a sufficient showing on an essential element of a claim in the case on which
4 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
5 (1985). There is no genuine issue of fact for trial where the record, taken as a whole,
6 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
7 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
8 present specific, significant probative evidence, not simply “some metaphysical doubt”).
9 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if
10 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
11 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
12 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
13 626, 630 (9th Cir. 1987).

14 The Court concludes that the instant motion involves purely a question of law.

15 **B. Defendant’s Motion**

16 The issue presented is whether a party may bring extra-contractual claims against
17 its flood insurance provider when that insurance issues under a Standard Flood Insurance
18 Policy (SFIP) pursuant to the National Flood Insurance Program (NFIP). Dkt. 49 at 2; *see*
19 *also* Dkt. 54 at 2.

20 The case law on this issue supports Defendant’s position that the only remedy
21 available to Plaintiffs is an action for breach of contract. *See* Dkt. 49 at 6 (collecting
22 cases). “Federal law has long recognized that an insured must comply strictly with the
23 terms and conditions of a federal insurance policy.” *Flick v. Liberty Mut. Fire Ins. Co.*,
24 205 F.3d 386, 390 (9th Cir. 2000); *see also* *Gowland v. Aetna*, 143 F.3d 951, 952 (5th
25 Cir. 1998) (recognizing that “the provisions of an insurance policy issued pursuant to a
26 federal program must be *strictly construed and enforced*”) (emphasis added).

1 In *Flick*, the court noted that it would be “anomalous” if policies written by write-
2 your-own (WYO) flood insurers, such as Defendant in this case, were subject to rules
3 different than those policies issued directly by the Federal Emergency Management
4 Agency (FEMA). *Flick*, 205 F.3d at 396 n. 14. Although WYO carriers issue the
5 insurance policies and process claims, they do so as fiscal agents of the United States.
6 *Van Holt v. Liberty Mut. Ins. Co.*, 163 F.3d 161, 165 (3rd Cir. 1998) (citing 42 U.S.C. §
7 4071(a)(1)). The terms of the SFIP are fixed by FEMA rather than by the carriers, and the
8 carriers are not permitted to deviate from those terms. *Id.* at 165-66; *see also* 44 C.F.R. §
9 61.13(d); Part 61, App. A(1), Art. 9(D). “Coverage is provided under the auspices of the
10 NFIP, pursuant to the program’s regulations, and is identical in scope and in cost to
11 policies issued directly by FEMA.” *Flick*, 205 F.3d at 389 (citing 48 Fed. Reg. 46789
12 (1983)). In short, a suit against a WYO flood insurer for breach of the SFIP is essentially
13 a suit against FEMA. *Id.*; *see also Flick*, 205 F.3d at 393 n. 10 (“Though policyholders
14 may file claims against WYO Insurers in federal court, . . . the claim is, in reality, a claim
15 against the federal government.”). Thus, in *Flick*, the Ninth Circuit held that “[t]here is a
16 compelling government interest in assuring uniformity of decision in cases involving the
17 NFIP.” *Id.* The primary issue in *Flick* concerned whether WYOs must strictly construe a
18 SFIP’s proof of loss requirement. *Id.* Notably, however, the parties in *Flick* stipulated that
19 state law extra-contractual claims are preempted by the National Flood Insurance Act
20 (NFIA). *Id.* at 389. Notwithstanding but consistent with this stipulation, the *Flick* court
21 was not silent regarding whether state law claims are, in fact, preempted by the NFIA. *See*
22 *Flick*, 205 F.3d at 393 n. 10; *see also Scherz v. South Carolina Ins. Co.*, 112 F. Supp. 2d
23 1000, 1009 (C.D. Cal. 2000).

24 Similar to *Scherz*, here “it is undisputed that, if FEMA had issued the SFIP
25 directly to [Plaintiffs, their] sole remedy for any alleged claims mishandling would be a
26 cause of action for breach of contract.” *Scherz*, 112 F. Supp. at 1009; *see also* 44 C.F.R. §
27 61, Appendix A(1) to part 61, Article IX (“This policy and all disputes arising from the
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1 handling of *any claim* under the policy are governed exclusively by the flood insurance
2 regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended (42
3 U.S.C. 4001, et seq.), and Federal common law.”) (emphasis added).

4 Accordingly, in *Scherz*, the court concluded that *Flick’s* “concern that WYOs not
5 be subjected to ‘special rules’ counsels in favor of finding conflict preemption . . . , for to
6 allow an insured to bring a state law tort claim . . . against a WYO insurer but not against
7 FEMA would amount to a special rule benefitting only some insureds.” *Id.* Put otherwise,
8 *Scherz* reasons that, to avoid frustrating the congressional goal of a uniform flood
9 insurance program, as discussed in *Flick*, state law claims must be preempted. Such
10 preemption leaves available only the cause of action of breach of contract, which is the
11 same claim that is permitted when a plaintiff brings their claim directly against FEMA.
12 *Id.* This Court adopts the reasoning and analysis of *Scherz* because to conclude otherwise
13 would

14 provide greater coverage at the same price to policyholders who purchase
15 insurance through the WYO program and conflict with FEMA’s goal that
16 flood insurance policies be “standard.” See 44 C.F.R. §§ 61.4(b), 61.13(d),
17 62.23(c), 62.23(d) (providing that the terms and conditions of flood
insurance policies shall be fixed by FEMA and issued without alteration);
48 Fed. Reg. 46789 (1983) (stating that coverage under the WYO program
is to be identical in scope and in price to coverage provided by FEMA).

18 *Flick*, 205 F.3d at 396 n. 14. Moreover, the Fifth Circuit has expressly held that the cause
19 of action available in cases such as these is limited solely to breach of contract. *See*
20 *Wright v. Allstate Ins. Co.*, 500 F.3d 390 (5th Cir. 2007) (holding that state law claims are
21 preempted by federal law).

22 Plaintiffs oppose this interpretation of the law (Dkt. 53) but offer no authority for
23 their position. Instead, the Court is urged “to search for a basis for allowing [their] extra-
24 contractual claims to go forward.” Dkt. 53 at 2. While the Court is not compelled to do
25 so, it has engaged in such a search and finds no authority to circumvent the principles of
26 law laid out in the above cited cases.

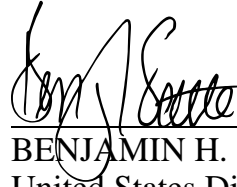
1 **C. Conclusion**

2 The Court concludes that Plaintiffs' extra-contractual claims should be dismissed.

3 **III. ORDER**

4 Therefore, it is hereby **ORDERED** that Defendant's motion for partial summary
5 judgment (Dkt. 49) is **GRANTED** as discussed herein.

6 DATED this 4th day of March, 2010.

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9 BENJAMIN H. SETTLE
10 United States District Judge